OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 2, 2003

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-4549

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183702.

The Texas Department of Criminal Justice (the "department") received a request for the department's entire file concerning EEO# 030000127. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because your claim regarding section 552.103 is the broadest, we address it first. This exception provides in part:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

You have submitted information to this office showing that the requestor's client filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and that the EEOC has dismissed the complaint and issued the requestor's client a notice of right to sue. Based on the information you have provided, we conclude that you have shown that litigation was reasonably anticipated when the department received this request. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, our review of the records at issue shows that they are related to the anticipated litigation for purposes of section 552.103(a). Thus, you have demonstrated the applicability of section 552.103.

We note, however, that once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). In this instance, the submitted documents include both a statement made by and a letter addressed to the requestor's client, who is apparently the only potential opposing party in the anticipated lawsuit. Because the potential opposing party has previously had access to these documents, you may not withhold them under section 552.103. All other submitted information may be withheld in accordance with section 552.103 until litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982) (concluding that applicability of litigation exception ends when litigation is concluded).

We note, however, that the requestor's client's statement includes information that is protected by common law privacy. Common law right of privacy, which is encompassed by section 552.101 of the Government Code[1], protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in Industrial Foundation included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation into allegations of sexual harassment. In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses." 840 S.W.2d at 525. Thus, based on *Ellen*, a governmental body must withhold information that would tend to identify a witness or victim.

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[1] Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

In this instance, the requestor's client's statement concerns an investigation of alleged sexual harassment. However, the requestor is the attorney for the alleged victim and, as such, has a special right of access to information concerning the victim's identity. *See* Gov't Code § 552.023(b) (governmental body may not deny access to representative of person to whom information relates on grounds that information is considered confidential by privacy principles). In accordance with the holding in *Ellen*, the department must redact from the victim's statement the information that we have indicated tends to identify the witnesses. We have also marked other information that must be withheld pursuant to section 552.101 and common law privacy.

The requestor's client's statement also contains information that is subject to section 552.117 of the Government Code. The 78th Legislature has amended section 552.117 to except from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of "a current or former employee of the [department] or of the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with Section 552.1175." Act of May 28, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified at Gov't Code § 552.117(a)(3)); *see also* Act of May 28, 2003, 78th Leg., R.S., S.B. 1388, § 4 (providing for immediate effectiveness of bill on receipt of vote of two-thirds majority of all members elected to each house). However, because section 552.117 is rooted in privacy concerns, the requestor has a special right of access to information concerning his client. *See* Gov't Code § 552.023(b). Thus, the department must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of any individual, other than the requestor's client, who was a current or former employee of the department or its predecessor. We have marked the information that must be withheld from the requestor's client's statement in accordance with this exception. Because the remainder of the requestor's client's statement and the letter addressed to her are not encompassed by your other claimed exceptions and are not otherwise confidential by law, they must be released to this requestor.

In summary, under section 552.103, the department may withhold the submitted information except for the letter addressed to the requestor's client and the statement made by that individual. Before releasing the statement of the requestor's client, the department must redact the information we have indicated is protected by common law privacy and section 552.101 as well as the information that is subject to section 552.117.[2]

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

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[2] As our ruling on these issues is dispositive, we need not address your other arguments.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 183702

Enc. Submitted documents

c: Mr. Robert Stone
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San Antonio, Texas 78209
(w/o enclosures)